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Supreme Court U.S.

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No. 96-8516

In The
Supreme Court of the United States
October Term, 1997

KENNETH E. BOUSLEY,

Petitioner,

vs.

JOSEPH M. BROOKS, WARDEN,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR PETITIONER

L. MARSHALL SMITH
2473 West 7th Street,
Suite 307
St. Paul, MN 55116
(612) 646-6635
Counsel for Petitioner

45 P

QUESTIONS PRESENTED

1. Does this Court's decision in *Bailey v. United States*, apply retroactively, so that a defendant who pled guilty to a charge of using a firearm in violation of 18 U.S.C. § 924(c) is entitled to collateral relief upon proof that he was not told that the facts of his case do not amount to "use" under § 924(c)?

2. Does a guilty plea waive the defendant's right to attack his conviction, where a subsequent change in the law makes the facts upon which the plea was based non-criminal?

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OPINION BELOW

The opinion of the Court of Appeals is reported at 97 F.2d 384 (1996) and reproduced in the Appendix. The unreported Order of the District Court in No. 5-94-87, May 18, 1995, from which the appeal was taken and the Report and Recommendation which it adopted without change, are reproduced in the Appendix.

JURISDICTION

The final judgment of the Court of Appeals for the Eighth Circuit was entered December 18, 1996 when that court denied Petitioner's timely petition for rehearing from its October 3, 1996 ruling.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendments to the United States Constitution.

Amendment V

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district

wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This case also involves the following statutes:

18 U.S.C. § 924(c)(1)

[W]hoever, during and in relation to any . . . drug trafficking crime, . . . uses or carries a firearm is subject to imprisonment for five years.

28 U.S.C. § 2255

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

. . . .

If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that

there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

STATEMENT

On the afternoon of March 19, 1990, police officers entered Petitioner Kenneth E. Bousley's house through the unlocked kitchen door to execute a search warrant. Presentence Investigation Report ("PSI") para 17, JA 37. Police had obtained the warrant based on information supplied by a confidential informant about methamphetamine trafficking at that location, and about a purchase that the informant had made there one or two days earlier, PSI para 6-8, JA 34. There was no mention of firearms in any of the information supplied by the informant, PSI para 6-9, JA 34-35; Habeas Petition, Ex. D.

The officers arrested Bousley, who was watching television in the bedroom. Bousley told the officers where to find two small bags of methamphetamine in the bedroom, and a coffee can in the garage which contained more methamphetamine. He also told the officers about two pistols that were stored in the bedroom, one in the headboard of the bed, and another inside a closed, zippered vinyl bag in the cabinet next to the bed, PSI para 8-9, 17 JA 34-35, 37.

Bousley gave the officers keys to the garage, where officers found the coffee can and two coolers, each with a

briefcase containing a substantial amount of methamphetamine, PSI para 7-8, JA 34. One of the coolers also contained two loaded handguns and one unloaded handgun.

Bousley was initially charged with possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). A superceding indictment added the charge that Bousley "knowingly and intentionally used the following firearms during and in relation to a drug trafficking crime. . . . in violation of Title 18 United States Code, Section 924(c)," JA 5. Bousley was not charged with "carrying" a firearm.

Section 924(c)(1) mandates an additional term of imprisonment for one who uses or carries a firearm "during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States." As defined in section 924(c)(2), a "drug trafficking crime" includes any felony punishable under the Controlled Substances Act, 21 U.S.C. § 801, et seq.

Bousley entered an agreement to plead guilty to both the drug and the firearm charges, JA 7. At the change of plea hearing, the trial judge asked if Bousley understood what he was charged with under Count II, the § 924(c) charge. The following colloquy then occurred:

DEFENDANT BOUSLEY: Possession of a firearm.

THE COURT: Okay. Now, it also charges you with possessing the firearms during, in, and in relation to a drug trafficking crime, the type of crime that was referred to in Count I. Would

you tell me what kind of weapons you had at the time in question?

. . . .

MR. PAULSEN [Assistant U.S. Attorney]: Are you satisfied, Mr. Peterson [Bousley's counsel], that there's a factual basis?

MR. PETERSON: I'm satisfied under the state of the law in this Circuit that there is a factual basis for Count II [the § 924(c) charge]. Hearing Tr. 13, 15, JA 25, 27.

The pre-sentence report noted that two pistols had been "found in the defendant's bedroom near the 6.9 grams of methamphetamine," and that "Three other firearms were found in the two briefcases containing the bulk of the methamphetamine," PSI para 8, JA 34.

The PSI also recited a written statement Bousley had supplied, which included the following:

15. "Offense - Possession of firearms.

16. "Explanation For Possession - I had the guns for when I wasn't home so Jessie [Bousley's live-in girlfriend] had protection because she had been raped and we didn't want something like that to happen again because the guy was never caught." PSI para 15-16, JA 37.

The trial court adopted these statements in its Finding of Facts, as part of its Sentencing Memorandum. JA 90.

In accordance with the plea agreement, the district court held an evidentiary hearing to determine the amount of methamphetamine for which Bousley should

be held accountable for sentencing purposes. Plea Agreement 5, JA 8-10. Bousley had denied knowledge of the contents of the coolers, and following the hearing, the trial court rejected the government's position, and found Bousley accountable for but two of the seven pounds of methamphetamine found in the coolers and the bedroom. Findings of Fact 3-4, JA 78-80.

The court sentenced Bousley to a term of seventy-eight months for the section 841(a)(1) drug charge and to the consecutive mandatory sixty-month sentence under § 924(c). Judgment 2, JA 82-84. He has now completed his entire sentence on the drug charge.¹

Bousley, represented by the same attorney who had represented him before the district court, unsuccessfully appealed his § 841(a)(1) conviction (*United States v. Bousley*, 950 F.2d 727 (CA8 1991) (table)). Not surprisingly, his attorney refused to raise any issues relating to the § 924(c) count in the appeal. Instead, counsel sent Bousley two letters explaining his reasoning and citing *United States v. Brett*, 872 F.2d 1365, 1370-71 (CA8), cert. denied 110 S. Ct. 322 (1989), and *United States v. Matra*, 831 F.2d 837, 843 (CA8 1988) for the proposition, which was well settled in the Eighth Circuit until *Bailey v. United States*,

¹ Bousley had completed the 78 month sentence by June of 1996. As of November 6, 1997, he had finished an amount equivalent to the 2-level enhancement which would have been imposed on Count I for possession of firearms under the Sentencing Guidelines. In view of the § 924(c) charge, enhancement was not imposed to avoid double counting firearms possession. PSI para 24, JA 40. Even if the firearms enhancement were to be added on resentencing, therefore, Bousley has completed his sentence on Count I.

116 S. Ct. 501 (1995), that the mere presence and ready availability of a firearm at a location where drug dealing takes place constitutes "use" of a gun under § 924(c). Pet. Reply to Mot. Dismiss, JA 135-141.

On July 5, 1994, Petitioner filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, which was treated by the district court as a motion to vacate sentence under 28 U.S.C. § 2255. JA 104, 115-117. In his Petition, Bousley alleged that there was insufficient evidence to support his conviction under § 924(c), that his plea of guilty to the § 924(c) charge was not supported by an adequate factual basis, and that § 924(c) is unconstitutionally vague. JA 105-109.

Bousley's habeas petition pointed out that at the hearing on his change of plea, the trial judge told him that he was charged with "possessing firearms during, in, and relation to a drug trafficking crime. . . ." Change of Plea Tr. at 13, JA 25. The full transcript of those proceedings was attached as Exhibit B to the habeas petition. Bousley also included his trial counsel's letters about § 924(c) in his Reply to the government's motion to dismiss. JA 135-143.

The government filed a motion to dismiss, asserting that Bousley had waived his right to challenge the factual basis for his plea by failing to raise it on appeal, and contending in any event that a sufficient factual basis for the plea was shown. JA 120 et seq. Among the cases the government's brief relied upon were the same ones Bousley's counsel had cited to him, *United States v. Brett*, 872 F.2d 1365 (CA8 1989) and *United States v. Matra*, 831

F.2d 837 (CA8 1988). Memorandum In Support of Motion to Dismiss 4, JA 124-126.

The Magistrate Judge recommended summary dismissal of the habeas petition. Among its findings were the following:

It is also well-settled in this Circuit that, in order to show that the Petitioner "used" the firearms in relation to his drug-trafficking activities, the Government need not prove that he was in actual possession of the firearm, or that he brandished or discharged it. [citations omitted.] Instead the Jury need only find a sufficient nexus between the gun and the drug trafficking crime. Report and Recommendation 8. JA 150-151.

The district court adopted the magistrate judge's Report without change on May 18, 1995, JA 154, and Petitioner appealed *pro se* to the Eighth Circuit.

On December 6, 1995, this Court decided *Bailey v. United States*, 116 S. Ct. 501 (1995), holding that a violation of § 924(c)(1) "requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." 116 S. Ct. 501, 505. "Active employment," this Court specified, "certainly includes brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." *Id.* at 508. However,

[a] defendant cannot be charged under § 924(c)(1) merely for storing a weapon near drugs or drug proceeds. Storage of a firearm,

without its more active employment, is not reasonably distinguishable from possession. *Id.*

Bailey thus represented a major departure from prior case law interpreting § 924(c) in the Eighth Circuit and in other circuits, all of which had interpreted "use" to include the mere "presence and availability" of a firearm in relation to a drug trafficking offense. Compare *United States v. Brett*, 872 F.2d 1365 (CA8 1989) and *United States v. Horne*, 4 F.3d 579, 587 (CA8 1994) with *Bailey*, 116 S. Ct. 501, 508.

Subsequently, the circuit court appointed present counsel to represent Bousley, who filed supplemental briefing arguing that *Bailey* required reversal of the district court ruling. Appellant's Supplemental Brief 1-2. The circuit court affirmed the district court in a published opinion, *United States v. Bousley*, 97 F.3d 284 (CA8 1996), which found that Bousley had "waived" his right to attack his guilty plea. JA 159. The court of appeals held:

The [district] court also advised Bousley that a guilty plea would foreclose an appeal of his conviction, and Bousley indicated that he understood this. Bousley was fully advised of his rights and understood that he was waiving those rights by pleading guilty. Because there is no indication that Bousley's plea was involuntary or uninformed, he has waived the right to collateral review of his conviction. 97 F.3d at 288, JA 162.

The circuit court acknowledged that its holding was directly contrary to *United States v. Barnhardt*, 93 F.3d 706 (CA10 1996). 97 F.3d at 288, JA 161 n.4. Bousley's petition for rehearing was denied on December 18, 1996.

The Petition for a Writ of Certiorari was filed on March 18, 1997. The Government filed a Brief ("US Brief") stating that Bousley's claims had been correctly "procedurally defaulted," and concluding, without explanation, that Bousley had "not demonstrated cause for his procedural default." However, the government did confess error on the part of the circuit court:

The court of appeals erred by failing to consider whether petitioner had made a sufficient showing of actual innocence to warrant reaching the merits of his constitutional claim, notwithstanding his failure to show and [sic] cause and prejudice. US Brief 9-10.

The Government's brief suggested that the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded "for further proceedings to determine whether petitioner should be excused from his inability to show cause and prejudice for his failure to advance his constitutional claim on direct review." US Brief 12. This Court instead granted Certiorari on September 29, 1997.

SUMMARY OF ARGUMENT

Petitioner's plea of guilty to charges that he "used" a firearm in violation of § 924(c) is invalid, because he was told at his change of plea hearing that he was charged with "possession" of firearms, and the facts show his conduct did not amount to "use," as that term is explained in *Bailey v. United States*, 116 S. Ct. 501 (1995). This materially inaccurate explanation of § 924(c) violated Bousley's Sixth Amendment right to be informed of the

nature of the charges he faced. See *Henderson v. Morgan*, 426 U.S. 637 (1976). He is entitled to relief through habeas corpus, because the fundamental defect that undermines the reliability of his guilty plea is apparent on the record, and because he has not previously had an opportunity to fully litigate this claim, first because the tools necessary to enable him to attack his guilty plea were not available until *Bailey* was decided, long after the judgment in the underlying proceeding was final; and second because the materially inaccurate information about the nature of the charges given him by trial court and his attorney kept him unaware that his rights had been violated until after he commenced these proceedings. *Davis v. United States*, 417 U.S. 333 (1974).

Petitioner's right to assert these claims was not "waived," because neither he nor his counsel was obliged to predict the *Bailey* decision, and the Fifth and Sixth Amendment rights he relies upon are so fundamental that their denial is inconsistent with the rudimentary demands of fair procedure. *Davis*, 417 U.S. at 346-47; *Menna v. New York*, 423 U.S. 61 (1975). Similarly, procedural default should have no application in this case, because it represents Bousley's first opportunity to fully and fairly litigate the denial of these fundamental rights. See *Blackledge v. Perry*, 417 U.S. 21 (1974). But even if these claims are viewed as defaulted, the denial of his right to be informed of the charges he faced and the newness of the *Bailey* decision establish cause for the alleged default, *Reed v. Ross*, 468 U.S. 1 (1984), and Bousley's incarceration for conduct that does not amount to a violation of § 924(c) establishes prejudice. *Sawyer v. Whitley*, 505 U.S. 333 (1992); see also *Schlup v. Delo*, 513 U.S. 298, 319-320 (1995).

Finally, as an independent ground of relief despite a finding of procedural default, Bousley has proved a fundamental miscarriage of justice, because he is incarcerated for conduct that does not violate § 924(c), he asserted his rights as soon as he reasonably could, and he is, in fact, innocent of the charge upon which he is now imprisoned. See *Murray v. Carrier*, 477 U.S. 478 (1986); *Schlup v. Delo*, 513 U.S. 298 (1995).

ARGUMENT

I

THE INTERPRETATION OF § 924(c) ANNOUNCED IN *BAILEY v. UNITED STATES* SHOULD BE APPLIED TO AFFORD PETITIONER COLLATERAL RELIEF FROM HIS GUILTY PLEA

In *Bailey v. United States*, 116 S. Ct. 501 (1995), this Court rejected the argument that Congress intended by its 1984 amendment to § 924(c) to expand the meaning of "use" so as to swallow the "carry" prong of the statute, *Id.* at 507-08. Instead, "use" retains its active employment component, requiring proof of acts such as "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." *Id.* at 508.

Among the acts specifically listed in *Bailey* as not triggering § 924(c) are storage of a firearm without active employment, and hiding a gun so it would be ready for an imminent confrontation. Moreover, "[i]f the gun is not disclosed or mentioned by the offender, it is not actively employed, and it is not 'used,' " *Id.* at 508-09.

In this case, the undisputed evidence adduced on the trial record and in the presentence report shows that Bousley's conduct did not amount to "use" of a firearm under § 924(c), and that his guilty plea to that charge was entered at proceedings where the court told him he was charged with "possessing firearms during, in and in relation to a drug trafficking crime." Change of Plea Tr. 13, JA 25. It is clear, moreover, that Bousley had no means of litigating claims based on the correct interpretation of § 924(c) until after the judgment in the underlying criminal case was final, for this Court did not decide *Bailey* until long after that case was affirmed on appeal. His attorney's advice during the appeal process, that mere presence and ready availability amounted to "use," Pet. Reply to Motion to Dismiss, JA 135-138, simply reflected settled Eighth Circuit holdings which would have rendered pointless an appeal on the grounds asserted in Bousley's present habeas corpus petition.

Bousley has shown that his guilty plea to the § 924(c) charge cannot stand because the proceedings in which it was entered were fundamentally flawed, and that there is substantial evidence of his factual innocence. The question before this Court is whether habeas corpus² is available to afford Bousley relief.

² The proceedings in this case have been treated as a motion "to vacate, set aside or correct the sentence" pursuant to 28 U.S.C. § 2255, although Bousley filed under 28 U.S.C. § 2241, Habeas Petition 1, App. _____. Numerous cases have acknowledged that the procedures and remedies available under § 2255 are identical to those afforded by traditional habeas corpus. See, e.g. *United States v. Hayman*, 342 U.S. 205 (1952); see also *United States v. Mackey*, 401 U.S. 667, 682 n. 1 (1971) (opinion concurring and dissenting in part). For simplicity, therefore, this Brief refers to

A. HABEAS CORPUS IS THE PROPER PROCEDURE TO LITIGATE PETITIONER'S CLAIMS OF FACTUAL INNOCENCE AND DENIAL OF HIS RIGHT TO BE INFORMED OF THE NATURE OF THE CHARGES HE FACED

The circuit court's conclusion that Bousley could not use the writ of habeas corpus to establish his factual innocence and to show that he was never properly informed of the charges against him in the underlying criminal case, 97 F.3d at 287, is inconsistent both with the long history of the Great Writ and with recent cases explaining its proper use.

In this case, Bousley was charged with a crime, but the information the court and his counsel gave him about the nature of the accusation was so inaccurate that it caused him to plead guilty when he was, in fact, innocent. In today's world, this is worse than supplying no information at all about the charges, for it is a commonplace that habeas corpus will be available to protect persons who are imprisoned without being told the "nature and cause of the accusation" they face. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975); *Riverside v. McLaughlin*, 500 U.S. 44 (1991). Bousley, on the other hand, was detained, deprived of accurate information about the reasons for his imprisonment, and never afforded access to the true nature of the charges against him until long after the judgment in his criminal case was final. To fail to afford him relief through a writ of habeas corpus is surely

the procedure as habeas corpus, encompassing the procedure in all its forms, except where otherwise indicated.

inconsistent with the long history of the writ and the rights it exists to vindicate.

More recent cases also support this argument. In *Davis v. United States*, 417 U.S. 333, 346-47 (1974), for example, this Court held that "law of the case" could not foreclose a federal prisoner's right to prove that his conviction and punishment were for conduct that is not criminal under a new rule of substantive law.

The circuit court opinion refused to apply *Davis*, because before the Ninth Circuit panel announced the new ruling Davis relied upon in his subsequent § 2255 motion, he had unsuccessfully presented his claim on direct appeal after a trial, 97 F.3d 284, 288 n.3, JA 161 n.3. *Davis*, however, does not rest on this ground or even address the issue of procedural default. The circuit court does not explain its conclusion, and no other cases that discuss *Davis* adopt this line of reasoning. This approach irrationally denies relief to prisoners who failed to foresee *Bailey*, and it is wholly unsupported. Not surprisingly, this view has been disclaimed by the government, US Brief 7, 10-11.

Davis is far from the only case illustrating the role of habeas corpus where there is a fundamental defect that renders a prisoner's confinement unlawful. In *Menna v. New York*, 423 U.S. 61, 62 (1975), for example, habeas relief was available to the petitioner because the face of the indictment to which he had pleaded guilty showed that his conviction violated the Double Jeopardy Clause. To the same effect is *Blackledge v. Perry*, 417 U.S. 21 (1974), where a defendant had been charged and convicted in state court with the misdemeanor of assault with a deadly

weapon. When he appealed, pursuant to state procedure, to obtain a trial de novo, he was charged with felony assault. His guilty plea to the more serious charge was not immune to collateral attack, because he was asserting his right not to be haled into court at all. *Id.* at 30-31.

Even cases which deny collateral relief have explained that in circumstances like *Bousley's*, habeas relief is proper. For example, *United States v. Broce*, 488 U.S. 563 (1989) specifically reaffirms the holdings of *Menna* and *Blackledge*, explaining that proceedings which are, on their face, constitutionally defective, can be collaterally attacked. 488 U.S. at 576.

Here *Bousley*, who was told that he was charged with "possession" of a gun, Change of Plea Tr. 13, JA 25, was deprived of his Fifth and Sixth Amendment rights when he was convicted under § 924(c) for acts that did not amount to "use" of a gun. The defects appear on the face of the record, so even though the avenue of direct appeal has been foreclosed, collateral attack should be available to address them.

A defendant's right to be informed of the charges he faces has always been fundamental to Anglo-American notions of due process and justice. See *Henderson v. Morgan*, 426 U.S. 637, 645 (1976). This right is made explicit in the Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation.

The framers of the Constitution realized, moreover, that this right requires a process to vindicate it. And as Hamilton pointed out in *The Federalist*, No. 84, the writ of habeas corpus has always been viewed as the means of redress for persons accused without proper notice or opportunity to respond:

The observations of the judicious Blackstone, in reference to the latter, are well worthy of recital: "To bereave a man of life, [says he,] or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government." And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the habeas corpus act, which in one place he calls "the BULWARK of the British Constitution." *Federalist*, 84, 6 (Hamilton).

Long before our Constitution was adopted, British subjects were jealous of their right to relief through the Great Writ. Indeed, one of the primary complaints made in the Petition of Right in 1628 was that prisoners were being brought before the justices pursuant to writs of habeas corpus, yet

no cause was certified, but that they were detained by your Majesty's special command, signified by the lords of your Privy Council, and yet were returned back to several prisons, without being charged with anything to which they might make answer according to the law. From *The Constitution Papers* (Electronic edition) Elec. Text Corp. (1987).

The importance of habeas corpus in our constitution is shown in the Suspension Clause, U.S. Constitution, Art. 1, section 9. And while Congress has enacted statutes which regulate the Great Writ's use and prescribe procedures by which it may be invoked, there is nothing in either the Constitution or the legislation to weaken or eliminate its historical purpose of affording prisoners a means of challenging their confinement when there has been a total miscarriage of justice or a fundamental defect that goes to the heart of due process of law.

Bousley's guilty plea was the result of such a fundamental defect, and his current imprisonment is a complete miscarriage of justice. *Menna v. New York*, 423 U.S. 61 (1975) holds that a plea of guilty does not bar a claim that the defendant's conviction is unconstitutional " 'no matter how validly his factual guilt is established' " if the facts he pled guilty to are subsequently determined not to be criminal. *Id.* at 62. Here, Bousley is entitled to habeas relief, because the acts for which he is now imprisoned did not violate § 924(c), his guilty plea rests on materially inaccurate information about the charges he faced, and he was never before afforded a meaningful opportunity to litigate these claims.

B. BOUSLEY'S CLAIMS ARE PROPERLY RAISED THROUGH HABEAS CORPUS, FOR THEY ESTABLISH FUNDAMENTAL FLAWS IN THE UNDERLYING FEDERAL CRIMINAL PROCEEDINGS WHICH COMPLETELY UNDERMINE HIS JUDGMENT OF CONVICTION AND THE SENTENCE HE IS NOW SERVING

Collateral attack of the kind Bousley now makes on his judgment of conviction is, of course, not a substitute

for an appeal. See *Sunal v. Large*, 332 U.S. 174, 178 (1947). There are claims which must be raised on direct appeal or defaulted, such as erroneous jury instructions, *United States v. Frady*, 456 U.S. 152, 167 (1982) and challenges to jury selection methods, *Davis v. United States*, 411 U.S. 233 (1973). Such claims can be fully addressed within the confines of the trial court record, and do not necessarily implicate the fundamental validity of the proceedings, so it makes sense for them to be raised and litigated on direct appeal. Defendants who fail to raise them at the first appropriate opportunity are defaulted, and must establish cause and prejudice for their failure in order to be heard on the merits of the defaulted claims. *Frady*, 456 U.S. at 167-68.

By contrast, claims which cannot be adequately litigated on direct appeal because they require proof of facts not on the trial record cannot be the subject of procedural default when they are raised in a first collateral proceeding. The Eighth Circuit approach is typical, requiring that claims of a coerced guilty plea and claims of ineffective assistance of counsel ordinarily *not* be raised on direct appeal. See, e.g., *United States v. Young*, 927 F.2d 1060, 1061 (CA8 1991); *United States v. Murphy*, 899 F.2d 714, 716 (CA8 1990); *United States v. Ulland*, 638 F.2d 1150, 1150 (CA8 1981) (per curiam); *United States v. Mims*, 440 F.2d 643, 644 (CA8 1971) (per curiam).

Also appropriate for habeas corpus are claims that arise from violations of fundamental rights, and which appear on the face of the record, so that the reliability of the outcome of the case is in question. The cases discussed at p. 15-16, above, including *Menna v. New York*, 423 U.S. 61 (1975), *Blackledge v. Perry*, 417 U.S. 21 (1974),

Davis v. United States, 417 U.S. 333 (1974) are examples. Procedural default is not at issue in cases of this type, because the defect in the judgment is apparent from the record. To go through the rubric of a procedural default-cause for default-prejudice analysis under these circumstances would be a wasteful exaltation of form over substance, since cause and prejudice are necessarily shown where the proceedings contain the evidence of their own fundamental invalidity. See the discussion at p. 35-36, below.

In determining if Bousley's claim is appropriately raised for the first time on a collateral attack, it is important to distinguish this case from those brought under § 2254 to attack state court judgments. Petitioners attacking state court judgments are presumed to have had access to courts fully competent to adjudicate all of their claims, including those grounded in federal constitutional law. *Sawyer v. Whitley*, 505 U.S. 333 (1992); see also *Schlup v. Delo*, 513 U.S. 298, 319-320 (1995). Most states have extraordinary writ procedures similar to federal habeas corpus that, to some degree at least, permit state court defendants to raise issues that are not cognizable on direct appeal, including claims based on the federal constitution. State courts are entitled to an opportunity to vindicate the rights of criminal defendants originally charged in state court, and to apply their own state procedural and substantive rules, so long as no federal constitutional principles are offended. Moreover, principles of comity require that federal courts pay due deference to state court proceedings. See, e.g. *Murray v. Carrier*, 477 U.S. 478 (1986); *McCleskey v. Zant*, 499 U.S. 467, 491 (1991).

These familiar principles illustrate why procedural default is at issue in virtually all federal court proceedings where a state court criminal judgment is under collateral attack. See *Sawyer*, 505 U.S. at 338-39.

Different considerations apply when a defendant seeks collateral review of federal trial court proceedings, although the fundamental goals of judicial efficiency and repose also obtain. Where the judgment under attack is a federal one, the extraordinary writs, including habeas corpus under § 2241 and § 2255, provide a defendant a first, and often only, opportunity to litigate issues which either could not be addressed on direct appeal, or are so fundamental that they inherently affect the validity of the prior judgment.

Here, Bousley's first real opportunity to show the invalidity of his guilty plea has come in these habeas proceedings, both because he was not aware of the true nature of the § 924(c) charges and because the courts to which he would have turned earlier would have summarily rejected his claims. Habeas corpus, which this Court has recognized as essentially an equitable remedy, *Schlup v. Delo*, 513 U.S. 298, 319 (1995) must not be denied, because no other remedy is available.

C. THE INTERPRETATION OF § 924(c) ANNOUNCED IN BAILEY SHOULD BE APPLIED TO ALL OF THE ISSUES IN THIS CASE BECAUSE ANY OTHER RESULT WOULD CONTRAVENE THE INTENT OF CONGRESS

The government has suggested that retroactivity is not at issue in this case, US Brief at 11 n. 6, and the circuit

court acknowledged *Bailey's* applicability, 97 F.3d at 287. However, the court below implicitly applied the pre-*Bailey* interpretation of § 924(c) to all of the issues it faced. As a result, it wrongly rejected Bousley's claim that his guilty plea was involuntary, and found "procedural default" despite the clear violation of Bousley's right to be informed of the nature of the charges he faced. Petitioner respectfully suggests there should be a forthright holding reaffirming *United States v. Johnson*, 457 U.S. 537, 550 (1982) and stating that § 924(c) must be applied, without reservation, in accordance with *Bailey*.

The court of appeals' failure to apply *Bailey* is most apparent in its response to Bousley's assertion that his guilty plea was involuntary and that he was factually innocent. The circuit court stated:

[T]here is no indication that Bousley's plea was involuntary or uninformed. . . . Bousley's counsel did recommend that Bousley not pursue an appeal of his section 924(c) conviction, but that recommendation was not unreasonable given counsel's understanding of this court's interpretation of section 924(c) before *Bailey*. 97 F.3d at 28, JA 162. [emphasis added.]

While this analysis correctly does not fault Bousley's trial counsel for his advice, its conclusion cannot be squared with *Bailey's* interpretation of § 924(c). In particular, Bousley's plea cannot be viewed as "informed," when his attorney and the trial court inaccurately told him that he could be convicted merely for possession of guns in proximity to the drugs in which he trafficked. Ch. of Plea Tr. 13, JA 25. To be sure, trial counsel's actions were reasonable, but that is not the sole, or even the primary

factor determining whether Bousley was correctly informed about the nature of the § 924(c) charges.

Just as a prosecutor's good faith cannot excuse the failure to disclose material exculpatory evidence, *Kyles v. Whitley*, 514 U.S. 419 (1995) (citing *Brady v. Maryland*, 373 U.S. 83 (1963)), the reasonableness of Bousley's trial counsel's actions do not make Bousley's confinement lawful. Instead, the inquiry should be whether the information given to Bousley about the charges accurately reflected § 924(c) after *Bailey*. Similarly, it does not matter that the trial judge acted in good faith when she inaccurately told Bousley he was charged with possession of guns. To find that Bousley's guilty plea was "informed" and "counseled" is to take the insupportable view that Congress intended § 924(c) to have an elastic meaning which changed on December 6, 1995.

Indeed, the appeals court's failure to apply *Bailey* to the voluntariness issue ignores this Court's analysis of legislative intent. *Bailey* teaches that Congress always intended to continue the requirement of active employment of a firearm. 116 S. Ct. 507-509. Thus, Congress must have intended this result from and after 1984, the last time it amended § 924(c). Had Congress intended to change § 924(c) for a while, or to give it a different meaning beginning December 6, 1995, it surely would have said so. To impose a rule that punishes possession of a weapon without active employment until December 6, 1995 and thereafter punishes only active employment would be judicial legislating of a most invidious sort. See *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994).

The circuit court cites no authority for its failure to apply *Bailey* to these issues, and the government seemingly concedes the error, US Brief at 9. There is no reason to apply § 924(c) inconsistently, as the court of appeals did, by acknowledging *Bailey* and then failing to apply it to the issues in the case. *Bailey* holds that the Government and lower courts were wrong when they secured guilty pleas from defendants who thought they could be convicted under § 924(c) for the mere presence and availability of guns. Consequently, the circuit court's observation that *Bailey*'s retroactive effect is a "distinct issue from whether a defendant has waived the right to collateral review by failing to preserve an issue on appeal," 97 F.3d at 288, is simply beside the point.

All the circuit courts which have considered the effect of the ruling in *Bailey* have concluded that it applies retroactively to cases on direct review. See *United States v. Cruz-Rojas*, 101 F.3d 283 (CA2 1996); *United States v. Mitchell*, 104 F.3d 649 (CA4 1997); *United States v. Andrade*, 83 F.2d 729 (CA5 1996); *United States v. Damico*, 99 F.3d 1431 (CA7 1996); *United States v. Staples*, 85 F.3d 461 (CA9 1996); *United States v. Wacker*, 72 F.3d 1453 (CA10 1995).

Similarly, many cases have also applied *Bailey* to provide relief on collateral review. See *United States v. Barnhardt*, 93 F.3d 706 (CA10 1996); *United States v. Cota-Loaiza*, 936 F. Supp. 751, 753-54 (D. Colo. 1996) (collecting cases holding that *Bailey* applies retroactively); see also *Triestman v. United States*, 124 F.3d 361 (2d Cir. 1997); *Stanback v. United States*, 113 F.3d 651, 654 n.2 (CA7 1997); *United States v. McPhail*, 112 F.3d 197, 199 (CA5 1997); but see *Price v. United States*, 959 F. Supp. 310, 315 (E.D. Va. 1997).

Most of these cases have relied on *Davis v. United States*, 417 U.S. 333, 346 (1974), where this Court held that a petitioner collaterally attacking his conviction should be given the benefit of case law decided after his conviction when the conviction was "for an act that the law does not make criminal." As the discussion at p. 15-16 explains, *Davis* requires the same result here.

When a similar situation arose in the wake of *McNally v. United States*, 483 U.S. 350 (1987) (mail fraud statute does not reach acts done with intent to deprive citizens of "honest government"), numerous cases applied its holding retrospectively. See, e.g., *Lomelo v. United States*, 891 F.2d 1512, 1515 (CA11 1990); *Borre v. United States*, 940 F.2d 215 (CA7 1991); *Callanan v. United States*, 881 F.2d 229 (CA6 1989).

Our research has found no cases which refused to apply *McNally* to judgments that were final before it was announced, although there are several lines of reasoning used to support these outcomes. Some cases have relied on that portion of *Teague v. Lane*, 489 U.S. 288 (1989) which requires retroactive application of decisions that place certain kinds of private conduct "beyond the power of the criminal law-making authority to proscribe." *Id.* at 307; see, e.g., *Lomelo*, 891 F.2d at 1515. It would seem unnecessary, however, to rely on the *Teague* rationale, both because *Teague* expressly limits itself to changes in constitutional rules of criminal procedure, 489 U.S. at 299, and because the more direct approach of looking to the intent of Congress, as explained above, should control.

While *Teague's* analysis of retrospective application is not directly applicable here, its holding and Justice Harlan's discussion of habeas jurisprudence in *United States v. Mackey*, 401 U.S. 667, 675 (1971) (opinion concurring and dissenting in part) upon which it is based point to the same result Petitioner seeks here. Justice Harlan argued in *Mackey* that new constitutional rules should always be applied retroactively to cases on direct review, but generally not to criminal cases on collateral review. But even Justice Harlan's general rule of non-retroactivity makes an exception where the new rule makes "certain kinds of conduct beyond the power of criminal law-making authority to proscribe." Justice Harlan reasoned that their rulings ought to be available to collaterally attack judgments that had become final before these new rules were adopted. *Mackey*, 401 U.S. 667, 693.

Bousley's situation here is similar, in that he seeks relief from conviction for acts that never were defined as criminal by § 924(c). Thus, although the *Teague* rationale does not directly apply here, the rule Bousley espouses is consistent with the reasoning in that case.

II

BOUSLEY'S GUILTY PLEA COULD NOT WAIVE HIS RIGHT TO BE INFORMED OF THE NATURE OF THE CHARGES HE FACED OR CURE THE FUNDAMENTAL DEFECTS IN THE PROCEEDINGS BY WHICH HE WAS CONVICTED

A. A GUILTY PLEA DOES NOT "WAIVE" FUNDAMENTAL DEFECTS IN PROCEEDINGS WHICH APPEAR ON THE FACE OF THE RECORD

Bousley shows in his Petition for Writ of Habeas Corpus that he was deprived of his right to be informed

of the charges against him in the trial court, and that this deprivation continued right through the appellate process. Change of Plea Tr. 13, JA 25. He also showed that the undisputed facts regarding his arrest tend to establish his factual innocence. PSI, para 6-9, JA 34-35; Habeas Petition Ex. D. The Plea Agreement and the transcript of the change of plea hearing show that Bousley's Sixth Amendment right to be informed of the nature of the charges he faced was violated, because he was told that possession of guns made him guilty of violating § 924(c). JA 25. The testimony at that hearing, JA 25-28, the testimony at the September 26, 1990 hearing on drug quantity accountability, JA 51-76, the trial court's Sentencing Memorandum, JA 90-92, and the Presentence Investigation Report, JA 34-49, all show that Bousley was, in fact, innocent of the § 924(c) charges. He argued these facts and claims before the circuit court. App. Brief at 7, App. Supp. Brief at 1-2. The government admits these facts, concedes error, and suggests the judgment below be vacated, US Brief 8-9, 12, although it does not go so far as to admit the constitutional violation. It is Bousley's view, however, that both the court of appeals and the government misapprehend the nature of his claims, the "waiver" issue, the "procedural default" issue, and the rights he seeks to assert in these proceedings.

The circuit court concluded that Bousley had "waived" these rights by pleading guilty, citing *United States v. Broce*, 488 U.S. 563 (1989), 97 F.3d at 287, JA 161. However, a guilty plea cannot "waive" either a defendant's right to an accurate explanation of the charges he faces, or the right to challenge the government's authority to hale him into court, for a guilty plea must be based

on an accurate explanation of the law in order to be valid. 488 U.S. at 574-75. Far from supporting the court below, therefore, *Broce* supports Petitioner, for it does not hold that a defendant "waives" all his constitutional rights by pleading guilty. *Id.* at 574. Indeed, to hold that a guilty plea could waive one's Sixth Amendment right to be informed of the nature and cause of the charges he faces, where the violation is shown on the trial court record, would eviscerate the right. As the discussion at p. 16 above shows, *Broce* recognizes this and reaffirms the cases which permit collateral attack. Where, as here, the constitutional violation is clearly shown on the trial court record, the defendant should be entitled, at a minimum, to have his guilty plea set aside. And where, as here, the record also establishes his factual innocence, he should be entitled to have the charge dismissed.

B. PETITIONER'S ATTACK ON HIS GUILTY PLEA SHOULD NOT BE DEFAULTED, BECAUSE IT IS BASED ON A FUNDAMENTAL DEFECT IN THE PROCEEDINGS WHICH APPEARS ON THE FACE OF THE RECORD, AND WHICH BOUSLEY HAS NEVER HAD A CHANCE TO LITIGATE

The court of appeals found that Bousley's claims had been procedurally defaulted because he "waived the right to collateral review by failing to preserve [the] issue on appeal," 97 F.3d 284, 287 n. 2. The government assumes, without discussion, that this ruling was correct, US Brief at 9-10. However, Bousley's claims are not the kind which are subject to procedural default, and imposing "default" would encourage piecemeal litigation and needless relitigation of well-settled precedent.

1. Procedural Default Has No Application To Bousley's Claims

Procedural default is an affirmative defense that must be asserted and established by the government. It can be waived if not timely asserted, *see Gray v. Netherland*, 116 S. Ct. 2074, 2082 (1996), and its applicability should not be presumed. However, procedural default cannot be established merely by showing that some or all of the facts upon which a collateral attack is based can be found in the trial record. Instead, it must be shown that a defendant already had a full and fair opportunity to litigate the claim to be defaulted, with due regard for the underlying goals of judicial economy and repose. Moreover, some rights are so fundamental that they can always be vindicated through collateral attack when their violation is evident from the record. Here, the claim of procedural default must fail, because Bousley never before had an opportunity to litigate the Sixth Amendment violations he asserts in these proceedings, and the violation of his right not to be haled into court appears on the face of the trial record.

Bousley asserts that his guilty plea is invalid because he was not properly advised of the nature of the § 924(c) charges he faced and that he is factually innocent of those charges. The government and the circuit court below have assumed, without explanation or analysis, that Bousley could have, and should have, asserted his claims in the appeal from his sentence on the underlying drug charges. 97 F.3d at 287; US Brief 9-10. But this assumption is faulty, as a closer look at the nature of the prior proceedings and the rights at issue in them shows.

Bousley's direct appeal provided him with an opportunity to point out erroneous rulings made by the trial court, and to litigate other issues fairly raised by the trial record. Because Bousley could have questioned the propriety of the change of plea proceedings under Fed. R. Crim. P. 11, the court of appeals implicitly assumes that these proceedings subsume all the constitutional protections to which Bousley was entitled in connection with his guilty plea. If this were so, then Bousley's failure to assert a Rule 11 violation on appeal would cause the default of the constitutional claims he raises in these proceedings.

Such is not the case, however, for Rule 11 cannot amend the Constitution, and following its processes does not necessarily mean that a defendant has been properly advised of the nature and cause of the accusation against him, any more than a violation of Rule 11 necessarily establishes a violation of a defendant's constitutional rights, *United States v. Timmreck*, 441 U.S. 780, 783-784 (1979). Instead, Rule 11 only describes a process which is aimed at assuring that defendants understand what they give up by pleading guilty. *Id.* at 781-82. Rule 11 also has another job, that of helping to assure finality after valid guilty pleas are entered. *Id.* However, nothing in Rule 11 or the cases that apply it suggest that it can be used to finesse away the defendant's right to be informed of the charges he faces before entering a guilty plea.

Here, the Rule 11 procedure had exactly that effect, for the trial judge unequivocally told Bousley he was charged with "possession" of a firearm. Ch. of Plea Tr. 13-15, JA 25-27. This inaccurate information about the

elements of the § 924(c) charge was reinforced by Bousley's attorney, and nothing happened before the appeal was final to cure the constitutional harm thus caused. Under these circumstances, expecting Bousley to have raised his Sixth Amendment claim on direct appeal is even more unfair than requiring a defendant victimized by ineffective assistance of counsel at trial to discover and assert the claim on a direct appeal that is being handled by the same trial counsel.

It is true that an appeal lies if the defendant is prejudiced by an inadequate or erroneous set of admonitions at the Rule 11 hearing. *McCarthy v. United States*, 394 U.S. 459, 466, (1969). But Bousley's right to appeal was meaningless, because the taint that afflicted his trial court proceedings had not been removed by the time his direct appeal became final. Indeed, it was not until this Court decided *Bailey* that the wherewithal to relieve Bousley from his Sixth Amendment deprivation became available.

The rule of procedural default is intended to encourage defendants to present issues for review in a timely and orderly fashion, to foreclose relitigation of issues already decided, and to discourage piecemeal litigation. *United States v. Frady*, 456 U.S. 152 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977). At the same time, the rights of defendants to relief from fundamental constitutional deprivations must be respected. Bousley can hardly be faulted for failing to tell the sentencing court that the court was depriving him of his constitutional right to accurate information about the charges he faced, for he had no way of knowing that the court was giving him inaccurate information. And, despite the government's bald assumption to the contrary, nothing occurred

between the proceedings in the sentencing court and the direct appeal to cure the constitutional deprivation Bousley suffered as a result of the sentencing court's misinformation. In fact, quite the opposite is true: his attorney continued to advise Bousley wrongly on the elements of § 924(c). His attorney's advice that it was futile to appeal from the guilty plea was correct, because Eighth Circuit case law was so well established. Nevertheless, this advice and the continuing vitality of cases such as *United States v. Brett*, 872 F.2d 1365 (CA8 1989) blocked Bousley's understanding of the charges he faced and the possible issues he could raise on appeal.

In sum, the Government's assertion of procedural default fails, because Bousley has never before been afforded a full and fair opportunity to litigate his Fifth and Sixth Amendment rights to be informed of the nature of the charges he faces before entering a plea.

2. Imposing Procedural Default in this Case Would Defeat the Goal of Judicial Economy and Encourage Piecemeal Litigation of Issues

Procedural default has no application to this case, because habeas corpus is the proper procedure, indeed the only available procedure, for Bousley to litigate his constitutional claims. Moreover, the principles that lead claims to be defaulted would be violated if Bousley were held to have defaulted the constitutional claims he asserts in his habeas petition.

The rule implicit in the circuit court's holding in this case promotes piecemeal litigation, and creates a class of

prisoners who are denied relief from their § 924(c) convictions solely because they happened to have appealed on other grounds before *Bailey* was decided. Moreover, the circuit court's ruling does not promote finality or judicial economy, because it encourages appellate counsel to repeatedly ask circuit courts to revisit well-settled issues of statutory construction.

Procedural default is not imposed on petitioners simply as a means of foreclosing collateral attack. Instead, petitioners are defaulted as part of an overall plan to require defendants to present their claims to the first available forum where the claims can be fully and fairly litigated. See *Murray v. Carrier*, 477 U.S. 478 (1986). Petitioners and their counsel who are aware of the risk of procedural default will raise and argue on direct appeal all claims which could potentially be defaulted. Appellate counsel who know that collateral attack is available for those claims which cannot be fully developed through the facts on the record, or which are so fundamental that their denial would invariably undermine the judgment, do not needlessly raise partial shadows of such claims on direct appeal. Under the circuit court's ruling, however, appellate counsel mindful of their duties as explained in *Anders v. California*, 386 U.S. 738 (1967) would have to add another category of issues to consider and raise in every case: claims which could conceivably come up for collateral review sometime in the future because of a possible change in settled precedent. This Court has recently rejected a similar proposed rule in connection with the plain error exception for issues raised for the first time on appeal. *Johnson v. United States*, 117 S. Ct. 1544 (1997).

Due process of law must mean more than just the opportunity to raise objections. Fundamental defects in proceedings which are "inconsistent with the rudimentary demands of fair procedure," *Hill v. United States*, 368 U.S. 424, 428 (1962), do not disappear just because they are not raised at trial or on appeal. It is the courts' responsibility to assure that these basic rules are followed. Otherwise, defense counsel would be obliged to submit a laundry list of demands that all constitutional guarantees be observed at all times, and appellate counsel would have to seek review of every well-settled circuit rule to avoid "default."

Ironically, if counsel were to follow the approach contemplated by the court of appeals, piecemeal litigation of claims would be assured. This result follows because Bousley's claim is based on *Bailey*, which could not have been raised on the direct appeal. And, having established his right to relief by pointing to the trial record and the materially inaccurate information about the § 924(c) charges found there, a litigant likely would need to supply additional facts to support his claim of remedy. Thus, the circuit court's proposed rule would not only require appellate courts to reconsider well-settled rules, it would assure that courts would have to visit the same issues twice in those rare instances where well-settled rules turn out to be wrong. It is far more efficient to permit petitioners like Bousley to assert their claims once and for all, in habeas corpus proceedings.

C. BOUSLEY IS ENTITLED TO RELIEF IN ANY EVENT, BECAUSE HE HAS ESTABLISHED "CAUSE," "PREJUDICE," AND A FUNDAMENTAL MISCARRIAGE OF JUSTICE

Thus far, the discussion has focused on the inapplicability of procedural default to this case. However, even if Bousley's claims were subject to procedural default, he has established cause and prejudice. Moreover, he has also established the right to show a fundamental miscarriage of justice, as the government concedes. US Brief 7, 10-11.

This Court has recognized that a defendant who fails to raise a claim in earlier proceedings establishes "cause" when he shows that his counsel's advice was constitutionally inadequate, or shows "that the factual or legal basis for a claim was not reasonably available to counsel, . . . or that some interference by officials . . . made compliance impracticable." *Murray v. Carrier*, 477 U.S. 478, 488, 492 (1986).

Here, Bousley has shown both that the legal basis for his claim was not reasonably available to counsel and that interference by officials – viz, the circuit and trial courts – made it impracticable for Bousley to assert his claim earlier. It is evident that, before *Bailey*, any attempt to attack Bousley's guilty plea would have been futile. See *Reed v. Ross*, 468 U.S. 1 (1984). The trial court had reinforced trial counsel's advice by calling the charge against Bousley "possession" of a gun. Change of Plea Tr. 12-15, JA 24-27. His counsel relied on settled Eighth Circuit law in refusing to appeal his § 924(c) conviction, leaving Bousley without a forum to present his claim.

The prejudice Bousley has suffered is apparent, for he is now serving time in prison for acts that do not amount to a violation of § 924(c). *Murray v. Carrier*, 477 U.S. 478 (1986); *Sawyer v. Whitley*, 505 U.S. 333 (1992).

Finally, for the reasons stated by the government in its Brief (at 9), Bousley has, at a minimum, established a fundamental miscarriage of justice because he is factually innocent. Even if cause and prejudice could not be shown, Bousley would be entitled to a hearing on his claim because he has established that he is factually innocent of the § 924(c) charge. See *Schlup v. Delo*, 513 U.S. 298 (1995). Having shown that no one could be convicted for the things he has done, Bousley's situation is substantially similar to the "prototypical example of 'actual innocence'; i.e., where the wrong person was convicted," as explained in *Sawyer v. Whitley*, 505 U.S. 333, 340 (1992).

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that the judgment of the Eighth Circuit Court of Appeals be reversed, and that the case be remanded with directions to reverse the judgment of the district court dismissing Bousley's Petition for Writ of Habeas Corpus, and to order that the district court enter a new and different order and judgment setting aside Bousley's plea of guilty on Count II of the indictment which charged

violation of § 924(c), and dismissing Count II with prejudice.

Respectfully submitted,

L. MARSHALL SMITH
2473 West 7th Street, Suite 307
St. Paul, MN 55116
(612) 646-6635

Counsel for Petitioner